

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

PATRICK H. POST,

Petitioner,

V.

PATRICK GLEBE,

Respondent.

CASE NO. C15-5364BHS

ORDER ADOPTING REPORT AND RECOMMENDATION

This matter comes before the Court on the Report and Recommendation (“R&R”)

of the Honorable Karen L. Strombom, United States Magistrate Judge (Dkt. 24), and

Petitioner Patrick Post's ("Post") objections to the R&R (Dkt. 25).

On August 5, 2016, Judge Strombom issued the R&R recommending that the

Court deny Post's petition on the merits as to all three claims and deny a certificate of

appealability. Dkt. 24. On August 12, 2016, Post objected to the R&R as to the third

claim for relief and the denial of a certificate of appealability. Dkt. 25. On August 15,

2016, Respondent filed a response to the objections. Dkt. 26.

The district judge must determine de novo any part of the magistrate judge's

disposition that has been properly objected to. The district judge may accept, reject, or

1 modify the recommended disposition; receive further evidence; or return the matter to the
2 magistrate judge with instructions. Fed. R. Civ. P. 72(b)(3).

3 In his third claim for relief, Post asserted that his appellate counsel was ineffective
4 for failing to submit on direct appeal the state's closing argument slide presentation. Dkt.
5 1 at 8. Judge Strombom concluded, and Respondant does not contest, that the Court
6 should review this claim *de novo* because the Washington Supreme Court did not reach
7 the merits of this claim. Dkt. 24 at 14. The Court adopts the R&R on this issue and will
8 review the merits *de novo*. *Pirtle v. Morgan*, 313 F.3d 1160 (9th Cir. 2002).

9 To show ineffective assistance of counsel, a petitioner must satisfy a two-part
10 standard. First, the petitioner must show counsel's performance was so deficient that it
11 "fell below an objective standard of reasonableness." *Strickland v. Washington*, 466 U.S.
12 668, 686 (1984). Second, the petitioner must show the deficient performance prejudiced
13 the defense so "as to deprive the defendant of a fair trial, a trial whose result is
14 unreasonable." *Id.* The petitioner must satisfy both prongs to prove his claim of
15 ineffective assistance of counsel. *Id.* at 697.

16 Assuming for the purposes of this motion that failure to include the slides fell
17 below an objective standard of effective representation, the Court will address the second
18 prong of the *Strickland* standard. Under the second prong, the petitioner must prove
19 prejudice from counsel's representation. It is not enough that counsel's errors had "some
20 conceivable effect on the outcome." *Id.* at 693. Rather, the petitioner "must show that
21 there is a reasonable probability that, but for counsel's unprofessional errors, the result of
22 the proceeding would have been different." *Id.* at 694.

1 In this case, Post argues that submission of the slides would have resulted in a
2 different outcome on direct appeal. The relevant facts are that (1) Post was convicted of
3 first degree child rape and first degree child molestation of MAM, (2) the trial court
4 admitted, over Post's objection, evidence of Post's earlier convictions for two counts of
5 indecent liberties against his daughter, CH, and his daughter's friend, HF, and (3) during
6 closing argument, the prosecutor used a slide show of a partially completed jigsaw puzzle
7 and urged the jury to essentially fill in the missing pieces of the puzzle. The Washington
8 Court of Appeals found and concluded, in relevant part, as follows:

9 We analyze whether the State's use of a jigsaw puzzle analogy at
10 closing constituted misconduct on a case-by-case basis, considering the
context of the argument as a whole. *State v. Fuller*, 169 Wn.App. 797, 825,
11 282 P.3d 126 (2012). In *State v. Johnson*, 158 Wn.App. 677, 682, 243 P.3d
936 (2010), for example, the prosecutor stated at closing:

12 I like to look at abiding belief and use a puzzle to
13 analogize that. You start putting together a puzzle and putting
14 together a few pieces, and you get one part solved. So with
15 this one piece, you probably recognize there's a freeway sign.
16 You can see I-5. You can see the word "Portland" from
17 looking in the background. You may or may not be able to
18 see which city that is, but it is probably near one that is on the
I-5 corridor.

19 You add another piece of the puzzle, and suddenly you
have a narrower view. It has to be a city that has Mount
20 Rainier in the background. You can see it. It can still be
Seattle or Tacoma, or if you weren't familiar, you might think
that mountain might be Mt. Hood, and it could be Portland.

21 You add a third piece of the puzzle, and at this point
even being able to see only half, you can be assured beyond a
22 reasonable doubt that this is going to be a picture of Tacoma.

23 We held that the prosecutor's jigsaw analogy in *Johnson*, 158
24 Wn.App. at 685, was improper because it "trivialized the State's burden,
25 focused on the degree of certainty the jurors needed to act, and implied that
the jury had a duty to convict without a reason not to do so." We further

1 held in *Johnson*, 158 Wn.App. at 682, 685, that the prosecutor's improper
 2 jigsaw analogy, when coupled with other instances of misconduct including
 3 asserting an improper "fill[-]in[-]the[-]blank" argument at closing, was so
 4 flagrant and ill intentioned that it evinced an enduring and resulting
 5 prejudice incurable by a jury instruction. Accordingly, we reversed and
 6 remanded Johnson's convictions for a new trial. *Johnson*, 158 Wn.App. at
 7 686.

8 However, we have held jigsaw puzzle analogies to be proper in other
 9 cases. For example, in *Fuller*, 169 Wn.App. at 827, we held the following
 10 argument employing the jigsaw puzzle analogy to be proper:

11 What I am going to do now is use a jigsaw puzzle to
 12 illustrate the concept of beyond a reasonable doubt We
 13 get a few of the pieces of the puzzle [W]e might think it
 14 looks like Tacoma, but we don't know—
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16 [W]e do not have enough pieces or enough evidence
 17 beyond a reasonable doubt that it's [a picture] of Tacoma. But
 18 let's say we get some more pieces But we may not yet
 19 have enough pieces, enough evidence to know beyond a
 20 reasonable doubt that it's Tacoma.

21 Now, we have more pieces. We have more evidence
 22 and we can see beyond a reasonable doubt that this is a
 23 picture of Tacoma

24 A trial is very much like a jigsaw puzzle. It's not like a
 25 mystery novel or CSI or a movie. You're not going to have
 26 every loose end tied up and every question answer[ed]. What
 27 matters is this: Do you have enough pieces of the puzzle? Do
 28 you have enough evidence to believe beyond a reasonable
 29 doubt that the defendant is guilty?

30 In holding that the State's use of the puzzle analogy was not
 31 improper in *Fuller*, we noted that, unlike in *Johnson*, the State's puzzle
 32 analogy "neither equated its burden of proof to making an everyday choice
 33 nor quantified the level of certainty necessary to satisfy the beyond a
 34 reasonable doubt standard." *Fuller*, 169 Wn.App. at 827.

35 Here, the analogy to a jigsaw puzzle in the State's closing argument
 36 is strikingly similar to the argument we approved in *Fuller*, as it does not
 37 quantify the level of certainty required by the jury to satisfy the State's
 38 burden of proof. *See Fuller*, 169 Wn.App. at 826–27; *see also State v.*
Curtis, 161 Wn.App. 673, 700–01, 250 P.3d 496 (2011) (State's puzzle
 40 analogy did not quantify the level of certainty required to satisfy the beyond
 41 a reasonable doubt standard and did not minimize nor shift the State's

1 burden of proof). Accordingly, we hold that the State's use of the puzzle
 2 analogy at closing did not constitute misconduct.

3 Post also noted that the prosecutor emphasized the significance of
 4 the 1987 convictions in the following excerpt from closing argument:

5 I submit to you that there would be a tough task at
 6 hand for you during your deliberation processes if this was
 7 simply a situation where [MAM] was saying to all of you, to
 8 14 of you as she's said to others, the defendant touched her
 9 privates and licked her privates, and that disclosure exists in a
 10 vacuum. The difference in this case, ladies and gentlemen,
 11 [MAM's] not alone, she's not standing alone. [CH] who was
 12 12 years old in 1984 and '85 is standing right there with her.
 13 [HF] who was 11 years old is standing right there with her.
 14 And they're saying to [MAM] and they're saying to you in
 15 the words that will come off the paper of Judge Swayze when
 16 he presided over that trial in 1986. The defendant did this to
 17 [MAM], right there and then you have [CH] and [HF] telling
 18 you, because he did it to us too.

19 RP at 625–26.

20 Since the evidence of the 1986 acts was properly admitted, the
 21 prosecutor had every right to emphasize their significance in closing
 22 argument. With the last sentence of this excerpt, though, the prosecutor
 23 came very close to urging the jury to view the 1986 acts as evidence that
 24 Post had a continuing propensity to carry out these acts, a purpose beyond
 25 the pale of ER 404(b). We need not decide whether that line was crossed,
 26 though, because Post neither objected to the remark at trial nor requested a
 27 curative jury instruction. Thus, under *Stenson*, 132 Wn.2d at 719, the test
 28 for misconduct is not met, even if the remark itself may be improper.

29 *State v. Post*, 175 Wn. App. 1050 (2013), 2013 WL 3874544 at *6–7.

30 Post contends that submission of the slides would have tipped the scale of
 31 32 improper comments in favor of reversal. Specifically, he contends that “[b]y viewing the
 33 34 slides with the oral argument it would have been clear that the State trivialized the burden
 35 36 of proof in two ways.” Dkt. 25 at 7. Post argues that the extent of the completed puzzle,
 37 38 in this case 50%, and the iconic nature of the image, the Seattle skyline as opposed to the
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1 rural city of Omak, trivialized the state's burden of proof beyond a reasonable doubt.
2 While Post's arguments are meritorious and it would be interesting to see how the state
3 court would have addressed them, Post fails to show a reasonable probability that
4 submission of the slides alone would transform the case into a *Johnson* case instead of a
5 *Fuller* case. It is clear that the state court focuses on the prosecutor's closing argument
6 and not the actual slides. *Post*, 2013 WL 3874544 at *7 ("the analogy to a jigsaw puzzle
7 in the State's closing argument is strikingly similar to the argument we approved in
8 *Fuller*, as it does not quantify the level of certainty required by the jury to satisfy the
9 State's burden of proof."). Thus, there is no reasonable probability that the state court
10 would essentially create new rules of law based on the content of the slides, at least when
11 the slides are similar to those reviewed in previous cases. Of course, the situation may be
12 different if the state showed one piece of a puzzle with an extremely iconic image, such
13 as the Mona Lisa's eyes, and asked the jury to solve the problem with no other evidence.
14 However, until the state courts pass upon that particular issue, this Court is unable to
15 predict or conclude the result of this hypothetical.

16 With regard to the Certificate of Appealability, Post argues that "[r]easonable
17 minds could differ on the question of whether the Washington State Court of Appeals'
18 decision was an unreasonable application of the facts." Dkt. 25 at 6. The Court disagrees
19 as to all three claims. With regard to the prosecutorial misconduct claim, Post fails to
20 show that the state court decision violated any establish Supreme Court precedent.
21 Moreover, the curative instructions undermine the claim that the comments so infected
22 the trial such that the conviction is denial of due process.

1 With regard to the ineffective assistance of trial counsel claim, it is not debatable
2 among jurists that Post is entitled to relief under the double deference standard of review.

3 With regard to the ineffective assistance of appellate counsel claim, it is not
4 debatable among jurists that submission of the slides would have resulted in a successful
5 appeal.

6 Therefore, the Court having considered the R&R, Post's objections, and the
7 remaining record, does hereby find and order as follows:

- 8 (1) The R&R is **ADOPTED**;
- 9 (2) Post's petition is **DENIED** on the merits;
- 10 (3) A certificate of appealability is **DENIED**; and
- 11 (4) The Clerk shall close this case.

12 Dated this 26th day of September, 2016.

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15 BENJAMIN H. SETTLE
16 United States District Judge
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